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IN THE

Supreme Court of the United States

October Term, 1948.

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,

vs.

FEDERAL POWER COMMISSION, MONDAKOTA GAS COMPANY, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and NORTH DAKOTA PUBLIC SERVICE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

Montana-Dakota Utilities Co., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case August 4, 1948, affirming orders of the Federal Power Commission.

STATEMENT AS TO JURISDICTION

The statutory provisions believed to sustain the jurisdiction of this Court are Section 19(b) of the Natural Gas Act, Act of June 21, 1938, Chapter 556, Sec. 19(b), 52 Stat. 831 and 28 U. S. C., Sec. 2101(c).

QUESTIONS PRESENTED

1. Does the Federal Power Commission have jurisdiction under the Natural Gas Act (52 Stat. 821, 15 U. S. C., Sec. 717-717w) to prescribe a system-wide rate on petitioner's natural gas pipe-line system for the common carrier transportation of natural gas, when it appears that the only rates previously in effect covered shipments through only one of petitioner's pipe lines, namely, its Black Hills line, and were not applicable to the transportation of natural gas in any other pipe line of petitioner's sytem to points in North Dakota or Montana?

2. Does the Commission have the power to prescribe a rate schedule which requires more than common carrier service, and in fact requires that petitioner deliver gas to a Shipper's customers in accordance with the needs of the customers regardless of the movement of Shipper's gas in the pipe line?

3. Can a common carrier pipe line company as to which no specific obligations have been imposed discharge its common carrier obligation by nondiscriminatory purchase of gas in the field in accordance with this court's definition of common carriers in *U. S. v. Ohio Oil Company,* 234 U. S. 548?

STATEMENT

In so far as these proceedings are concerned, Montana-Dakota Utilities Co., the petitioner, is a public utility company engaged in the production, transportation in interstate commerce and sale of natural gas to consumers. It produces gas in the Baker-Glendive Field in eastern Montana and western North Dakota from which pipe lines extent to Glendive, Montana, and Williston, North Dakota, to Bismarck, North Dakota, to the Black Hills District of South Dakota and to Miles City, Mon-

tana. It also produces gas in the Bowdoin Field situated in Valley and Phillips Counties, Montana. In 1940 a pipe line was constructed from the Bowdoin Field to a point of connection with the line extentending from Glendive, Montana, to Williston, North Dakota, so that from 1940 the two fields have been interconnected although gas produced in the Bowdoin Field has never been transported south from the Baker-Glendive Field through the Black Hills line to the Black Hills district of South Dakota (R. 182-184). A map of the system was introduced in evidence as Exhibit A. A copy of this exhibit, reduced in size, is attached as an appendix to this petition and brief.

Certain of petitioner's pipe lines cross government lands under rights-of-way granted by the Secretary of Interior under the Leasing Act of 1920 as amended (41 Stat. 449; 49 Stat. 678; 30 U. S. C., Sec. 185). (Petitioner's pipe line from its Cabin Creek compressor station to Bismarck, North Dakota, crosses no government land.) Section 28 of the Leasing Act as amended provides:

> "Rights-of-way through the public land, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescrbed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the

> Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable," etc. (49 Stat. 678; Title 30 U. S. C., Sec. 185).

The Natural Gas Act does not make any pipe line a common carrier nor does it delegate any power to the Federal Power Commission to require that a pipe line company shall carry gas for others. It gives to the Federal Power Commission only regulatory power over rates by authorizing the Commission to hold hearings and to substitute for an unfair, unjust or discriminatory rate one which is just, reasonable and nondiscriminatory (Natural Gas Act, Sec. 5(a), 52 Stat. 821, 15 U. S. C., Sec. 717 (d)).

On October 27, 1933, and on March 2, 1937, Montana-Dakota Utilities Co. promulgated two rate schedules for the transportation of natural gas from the Baker compressor station in the Baker-Glendive Field to the Black Hills district in South Dakota. (Exhibits 20 and 17, R. 595, 577). These schedules were given to Montana Eastern Pipe Line Company, a corporation, on demand of John Wight who was then associated with that company (R. 192-193), but no gas was offered for shipment under either schedule. No other rate schedules were ever in effect on any part of petitioner's pipe-line system.

Without any prior demand or without having furnished information to petitioner as to any amount of gas to be shipped, the points of origin or destination, the amount of space in petitioner's pipe line which would be taken from petitioner and used by the Shipper, Mondakota Development Company (a predecessor of Mondakota Gas Company) instituted a proceeding before the Federal Power Commission alleging that it had prospective customers for gas in North Dakota and South Dakota, alleging that the rate schedules of petitioner were

unjust, unreasonable and discriminatory and requesting the Commission to fix just and reasonable rates.

By its orders the Federal Power Commission has purported to prescribe a rate schedule applicable not only to the line extending from petitioner's Baker compressor station to the Black Hills but applying to petitioner's entire system.

Moreover, this order requires petitioner to perform a function beyond that performed by any common carrier. It requires the petitioner to deliver gas to the Shipper's customers in exactly the same manner as it presently delivers gas to its own customers regardless of the movement of the Shipper's gas in the pipe line. The Commission's order provides:

> "The transportation service rendered shall, in all ways, be equal to the firm deliveries made by the Company for itself or for others. During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

This is not a requirement that petitioner give common carrier service, but it is a requirement that petitioner make deliveries regardless of the movement of Shipper's gas and on the same basis that regular public utility deliveries to customers are made.

Petitioner contends that the only power delegated to the Federal Power Commission under the Natural Gas Act, which Act is admittedly the only source of power of the Federal Power Commission in this proceeding, is the power delegated to it under Section 5(a) of the Natural Gas Act to substitute a just, reasonable and nondiscriminatory rate for a rate found by it to be unreasonable, unjust or discriminatory. Petitioner contends that the Federal Power Commission does not in this case have

the power to fix a system-wide rate, that is, to initiate rates on petitioner's system over most of which rates have never previously been in effect.

The Court of Appeals in its opinion Record, Vol. IV, page 17), states that the Commission found petitioner's former rate schedules to be unduly discriminatory "in that they are greater than the rate charged for gas (i.e., the cost of the gas plus all transportation costs), delivered to petitioner's own industrial customers, each of whom is served directly from transmission lines." The Court then states:

> "Under these circumstances, no feasible plan is suggested to eliminate discrimination, and it does not appear that any effective regulatory rate order could be entered to achieve that result, without including the entire system" (Record, Vol. IV, page 18).

The Court's conclusion is an obvious non sequitur. Assuming that petitioner's transportation rates are discriminatory because they are higher than certain of petitioner's sale prices for gas, such discrimination can be readily removed by lowering the transportation rate. Such discrimination furnishes no justification for the action of the Commission in purporting to fix a rate applying to the entire pipe-line system, over most of which no rate had ever before been in existence.

There is no legal basis on which the Commission or the courts can justify the action of the Commission in requiring that petitioner give continuous and uninterrupted deliveries to a Shipper's customers regardless of the movement of the Shipper's gas in petitioner's pipe line. Neither the Commission in its brief in the United States Circuit Court of Appeals, nor the court have attempted to explain the source of the Commission's power to impose such a requirement or to justify the Commission's action in imposing this requirement in its order.

Petitioner is a common carrier only by reason of the Leasing Act (49 Stat. 678; Title 30 U. S. C., Sec. 185), which imposes no requirement that rates be established or published. It must be assumed that congress used the term "common carrier" as that term was understood and used by this court in *U. S. v. Ohio Oil Company,* 234 U. S. 548, in which this court has held that oil pipe lines carrying gas purchased in the field by the Company were common carriers. By failing to require that the Company must establish and publish tariffs for transportation, Congress must have intended, and the language of the Leasing Act provision is indicative of such intention, that petitioner could fulfill its common carrier function by a nondiscriminatory purchase of gas produced in the vicinity of its pipe line. Under Unit Plans of Development adopted under supervision of the Secretary of Interior and effective in the entire area in which natural gas transported through petitioner's pipe lines is produced, petitioner has purchased all gas produced and offered for sale to it on a nondiscriminatory basis and at rates approved by the Department of Interior.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the order of the Commission and the judgment of the court below operate to take from petitioner the right to initiate rates for a common carrier transportation of gas in its pipe lines, other than its Black Hills line, in conflict with the prior decision of this Court in *I. C. C. v. Cincinnati N. O. & T. P. R. Co.,* 167 U. S. 479, and other cases. Apparently both the Commission and the court below concede that the Commission has no original rate making power, but that result, namely, the initiation of rates by the Commission, is accomplished under the order by indirection and through enlargement of the powers granted to the Com-

mission. The Commission resorts to the device of assuming that discrimination exists because petitioner's transportation rates in effect on its Black Hills line are higher than petitioner's sale prices on other parts of its system and by assuming that such discrimination can be remedied only by fixing lower transportation rates on the entire system when obviously such discrimination could be completely and effectually removed by lowering the transportation rates on the part of the system to which they applied, namely, the Black Hills line, leaving to petitioner the unimpaired right to initiate rates on other parts of the system upon reasonable demand for such rates.

This case is the first case to involve the power of the Federal Power Commission to fix rates under the Natural Gas Act for the interstate transportation of natural gas. As stated by the court below:

> "The whole record here reflects the existence of a dispute and controversy involving not only factual questions but also questions of law which ought to be determined for the future guidance of the petitioner and the Commission."

Inasmuch as Section 5(a) of the Natural Gas Act (Title 15 U. S. C., Sec. 717 (d)) is the only grant of power to the Federal Power Commission to fix rates for the interstate transportation of natural gas and such power is merely a revisionary power, it becomes a matter of public interest, for the determination of this Court, whether the Commission can make an order applying to lines over which no rates have ever been in effect merely because the Commission has found that former transportation rates on other parts of the system exceeded sale prices. Viewed in its broader aspects, the question is whether the Commission can justify an order on the basis that it is for the purpose of removing discrimination when such discrimination could be effectively and completely removed

without the taking of any such action. The matter is, therefore, an important question of Federal law which has not been and should be settled by this Court.

This case likewise presents for the first time the question whether a common carrier of natural gas must deliver to the Shipper or his customers as the gas is needed at the delivery end of the pipe line regardless of the movement of gas in the line. Such requirement is entirely novel so far as common carriers are concerned. It is therefore a matter of public interest for a determination of this court whether the Commission has the power to impose such an obligation upon a common carrier pipe line.

It likewise is a matter of public interest whether a common carrier pipe line as to which no specific duties have been imposed, can discharge its duties by nondiscriminatory purchases of gàs, thereby being a common carrier within the definition of a common carrier laid down by this court in *U. S. v. Ohio Oil Company*, 234 U. S. 548.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not officially reported.

JURISDICTION, QUESTIONS PRESENTED, ETC.

A statement of the jurisdiction of this Court, the questions presented, the statement of the case and the reasons for granting the writ are set out in the petition.

ARGUMENT

The Commission Exceeded Its Power in Prescribing a System-wide Rate.

The Federal Power Commission has no power to prescribe rates for the common carriage of natural gas in petitioner's pipe line except as the power is derived from Section 5(a) of the Natural Gas Act which provides:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

In the exercise of the powers thus conferred upon it the Commission could not prescribe new rates; it can only substitute a just, reasonable and nondiscriminatory rate for one found to be unjust, unreasonable or discriminatory. It is not given the power to take from a utility its inherent right to initiate new rates.

In this case the only rate schedules at any time in effect were petitioner's rate schedules F. P. C. No. 3-G and F. P. C. No. 4-G, each of which applied only to the Black Hills line extending from the Baker compressor station to the Black Hills. No rates were ever in effect on the line from the Cabin Creek Compressor station to Miles City, the line from the Cabin Creek station to Glendive, Montana, and Williston, North Dakota, the line from the Cabin Creek station to Bismarck, North Dakota or any line extending out of Bowdoin Field. Nevertheless, the Commission has purported to fix a new rate applicable on the entire system including those referred to over which no rates had previously been in effect.

Since no legislative power has been delegated to the Commission to fix such system-wide rates where none previously existed, the Commission's rate order can be valid only if the power delegated to the Commission could not otherwise be carried out. If the vice found to exist in the rates applicable to the Black Hills line could be remedied by a new rate schedule applicable only to the line, obviously the Commission has no power by an order to fix rates encompassing the entire system.

The fact is that the only justification urged for the Commission's order is that the rates on the Black Hills line were discriminatory because they were higher than industrial sales contracts applicable to various customers on other parts of petitioner's system. If a rate is improper because it is too high, the impropriety can be removed by lowering it. The so-called discrimination found by the Commission and which is referred to by the court below as justification for the Commission's order (Record, Vol. IV, page 17) was due only to the fact that the rates in existence were too high. Such discrimination could have been fully and completely removed by reducing the rate on the Black Hills line. Therefore, the Com-

mission was entirely without power to fix a rate applicable to the entire system.

This Court has held that the power to prescribe rates must be specifically conferred and is not to be implied. In *I. C. C. v. Cincinnati N. O. & T. P. R. Co.,* 167 U. S. 479, the Court said:

> "We have, therefore, these considerations presented: First, the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function. * * * Second, that Congress has transferred such a power to an administrative body is not to be presumed or implied from any doubtful or uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third, incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future" (pages 505, 506).

It is therefore apparent that the order is not an exercise of power granted the Commission but is wholly in excess of its power and is therefore invalid and void.

The Order of the Commission Is Invalid Because It Purports to Place Upon Petitioner Obligations in Excess of Those Enjoined by Law Upon Common Carriers.

In its order of March 22, 1946, the Commission orders that:

> "(B) Montana-Dakota Utilities Co. file, on or before June 1, 1946, a new rate schedule for the common carrier transportation of natural gas in in-

terstate commerce, reflecting the rates and charges set forth in 'Exhibit A,' appended hereto and made a part hereof, and providing substantially the terms and conditions outlined therein" (R. 140, 141).

Exhibit A, which is made a part of the order, contains the following requirement for Character of Service:

> "The transportation service rendered shall, in all ways, be equal to the firm deliveries made by the Company for itself or for others. During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

Exhibit A also contains the following provision under the heading "Applicability":

> "Transportation of natural gas, as used in this rate schedule includes actual transportation of gas from point to point and receipt of gas at one point and delivery of a like amount of gas at another point (after making allowance for line losses and adjustment for variations in heat content of gas) without regard for the fact that such delivery may have been accomplished by exchange or displacement" (R. 142).

Under the heading "Company's Obligation to Deliver Gas" Exhibit A provides:

> "The Company has no obligation to make deliveries beyond the amount of gas received from Shipper for transportation" (R. 145).

The effect of the order is not to require petitioner to accept natural gas for transportation and to transport it as a common carrier, but to require petitioner to furnish to a Shipper's customers uninterrupted deliveries of gas not as a common carrier function but as a public utility service. Power to impose such requirement has not been delegated to the Commission.

Petitioner has constructed its system as a natural gas public utility (R. 181). As such it has undertaken to provide a system adequate to produce, transport and distribute to its customers natural gas at all times in the quantities needed by the customers. This is not common carrier service. It is a service peculiar to a natural gas public utility.

No common carrier is operated on such a basis. The Interstate Commerce Commission cannot order a railroad to provide continuous, uninterrupted deliveries of grain to a mill, in the quantities required by the mill from day to day, provided only that the shipper has in the hands of the railroad at some point on its lines grain in an amount at least equivalent to the deliveries. A railroad or other common carrier is required to deliver only when the goods actually reach the point of destination.

The Federal Power Commission does not require that petitioner shall deliver in accordance with the specific or normal movement of gas in the pipe line. Its order requires petitioner to deliver gas to the Shipper's customer at any point on its system even though none of the Shipper's gas could be physically available at the place of delivery. Since deliveries are determined by the needs of the user rather than the movement of the Shipper's gas the order requires petitioner to store the Shipper's gas in its line if the Shipper's customer is not ready to take the gas when it reaches its destination. This is not the kind of common carrier transportation furnished by any other common carrier. What statutory authorization does the Commission purport to act upon in the making of the order?

The fact is that the Commission's order is not an order for common carrier transportation. It is an order requiring petitioner to engage in a new form of public utility business. Under the order petitioner must accept gas from the Shipper at its compressor station. It must de-

liver gas to the Shipper's customers as they want it, whether the Shipper's gas has reached the customers or not. It is in effect an order requiring petitioner to buy from a Shipper, and to sell to the Shipper at preferential rates wherever the gas is needed by the Shipper's customers.

The Commission's order recognizes the problem every gas pipe line faces in cases of breakage or on peak days —namely, the necessity of discriminating between domestic customers and other customers, and the Commission to quote its order says the solution to that problem is:

> "During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

But the Commission's solution is not a solution and is beyond the power of the Commission to prescribe.

In order to proceed in accordance with the solution proposed by the Commission, petitioner must know the classifications of service which the Shipper affords to its customers. It must know the needs of the Shipper's customers. Only with this knowledge can petitioner operate its line during peak periods. This point can be illustrated by considering petitioner's responsibility to deliver gas to a Shipper's branch line which might serve five customers, three of which may be industries, the other two a school and a hospital. Petitioner can reduce the deliveries to the extent of the needs of the industries but it must deliver gas to provide for the needs of the other customers. It must, therefore, have complete and up-to-date information concerning the needs of the individual customers of the Shipper.

In its requirement that petitioner render transportation service equal to firm deliveries to its own customers,

the order places an impossible and wholly unauthorized burden upon petitioner. As a practical matter, it could not reasonably keep itself sufficiently informed concerning operations of a Shipper in any way without carrying on two or more separate public utility operations. In this connection it is of interest to note that the rate order affords no compensation to petitioner for the additional activities which it would be required to carry on. The rate prescribed by the Commission's order contemplates no expense on petitioner's part other than the expense heretofore incurred in the transportation of its own gas (R. 140).

Where, with respect to other carriers, a regulatory body is given power to fix rates, such power is derived from a specific legislative delegation of power. No such power has been delegated to the Federal Power Commission.

Petitioner submits that the Commission was without power to enter the order and that the order of March 22, 1946, and the order of January 29, 1947, which purports to confirm it are void and unenforceable and should be wholly set aside, and that the order of the court below should be reversed."

The Order of the Commission Is Void Because Petitioner Was Performing Its Obligation Under the Leasing Act by Nondiscriminatory Purchases of Gas in the Area Served by Its Pipe Lines.

The only obligation imposed upon petitioner which can be the basis for any order of the Federal Power Commission is embodied in Section 28 of the Leasing Act as amended on August 21, 1935, which provides:

> "Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural

> gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable," etc. (Title 30, U. S. C., Sec. 185).

The intent of Congress in enacting this section was to provide a market for gas and oil produced on Government land. Congress was not undertaking to provide transportation for the public at large but was protecting the public domain.

In undertaking to place a common carrier obligation upon the holder of a right-of-way across the public domain, Congress was using the term common carrier as that term was then applied in the case of pipe line companies. Many years prior to the enactment of Section 28 the Supreme Court stated that a common purchaser of oil which is later transported through its pipe line to its refinery was a common carrier. In effect it held that the purchasing of oil prior to shipment and the shipment thereof was a common carrier function.

In *U. S. v. Ohio Oil Company,* 234 U. S. 548, 58 L. Ed. 1459, the Court held that the provisions of the Interstate Commerce Act as amended were applicable to oil pipe lines which purchased oil from producers in the field and transported such oil through their pipe lines even though title to all oil entering the pipe was in the pipe line company.

The amendment to the Interstate Commerce Act provided:

> "That the provisions of this Act shall apply to any corporation or any other person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe line or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act."
>
> (Act of June 29, 1906, Ch. 3591, 34 Stat. L. 584).

In holding that the pipe line companies engaged in operations above described were common carriers, Mr. Justice Holmes, in the opinion among other things, stated:

> "They carry everybody's oil to a market although they compel outsiders to sell it before taking it into their pipe lines."

The Court held that the common purchaser was a common carrier. To the same effect see *Champlin Refining Company v. U. S. A. and I. C. C.* (329 U. S. 29); *Valvoline Oil Company v. U. S. A. and I. C. C.*, 308 U. S. 141.

Since purchasing in the field and shipment thereof constitutes common carriage, it necessarily follows that a common carrier obligation imposed without specific expression of the manner in which the obligation shall be discharged may be discharged by carriage after purchase as in the Ohio Oil Company case.

Section 28 of the Leasing Act itself supports this construction. In effect it requires that the line shall be operated as a common carrier and in defining the manner of discharging the obligation, it provides that the pipe line companies shall convey or purchase without discrimination oil or natural gas produced from government land in the vicinity of the pipe line, etc.

All of the natural gas transported through defendant's pipe lines is produced under Unit Plans of Development, the operation of which is under the supervision of the Secretary of the Interior (R. 183, 184, 185). Through the operation of the Plan the cost of production and maintenance and the proceeds of gas produced are allocated among the owners of the land in the area on an acreage basis (R. 185). Petitioner is therefore discharging its obligation through such purchase and no other obligation is placed upon it.

Under any other construction it would appear to us that Section 28 of the Leasing Act is so vague as to be wholly meaningless and unenforceable. Long prior to the enactment of the Leasing Act Congress was aware of the necessity for specific and detailed provisions governing common carriers. It cannot be assumed that with such a background Congress through a mere provision that pipe line companies "shall be constructed, operated and maintained as common carriers" intended to make pipe line companies common carriers without any provision as to the manner in which their obligations should be discharged. The common carrier provision is merely a part of the obligation placed by Section 28 upon the pipe line company. Construed together with the other language of that section it requires the pipe line company to discharge its common carrier obligations either through purchase or transportation. In petitioner's case its obligation can be discharged only by purchase since all of its gas is produced in fields under the Unit Plan. It could not without discrimination purchase some of that gas and transport the balance. All the gas must be treated in the same manner.

At the time of the amendment of the Leasing Act Congress had under consideration legislation to declare pipe line companies common carriers. Title 3 of the Wheeler-Rayburn Bill contained a provision to that ef-

fect. At the time of passage of that bill five days following the amendment of Section 28 of the Leasing Act in 1935, the provision to make pipe line companies common carriers was eliminated from the bill. It must be assumed that Congress knew the difficulties attendant upon the operation of a natural gas pipe line company as a common carrier and eliminated the the common carrier provision of the Wheeler-Rayburn Bill for that reason, having already protected the public domain by the enactment of Section 28 of the Leasing Act, under which a market was provided for all gas produced on the public domain.

Petitioner submits that its obligation is being discharged through its operation as a common purchaser under the Leasing Act and that it is not obligated under the Leasing Act or any other statutory provision to transport natural gas as a common carrier so long as it is acting as a common purchaser. The orders of the Federal Power Commission are therefore invalid and void and should be set aside, and the order of the Court below should be reversed.

We respectfully submit that the petition should be granted.

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AUTHORITIES CITED

petitioner to establish rates. It further asserts that since petitioner has persistently refused to perform its duty, the Commission could itself establish the rate (Federal Power Commission brief, 11, 12). This is of course a complete disregard for the due processes of law.

If under Section 4 (c) the Commission assumed that it had the right to order petitioner to fix rates, it should have done so, rather than arbitrarily undertaking to fix a rate itself. Petitioner could then have requested review of such order to determine whether, in the absence of a reasonable request for service, it must fix rates. If the Commission's order were found to be valid petitioner could then itself establish such rates. The Commission could not arrogate to itself the right to fix such rates merely because petitioner in the absence of reasonable request had not done so. The Commission has overlooked the fact that under our system of laws even a known criminal has the right to insist upon the due processes of law.

Section 4 (c) of the Natural Gas Act[1] *contains nothing more than a requirement that a natural gas company file with the Commission schedules showing such rates classifications, practices, regulations and contracts affecting them, as it has in force. It is not a requirement that a company fix rates for every type of service which it conceivably could render, which if rendered would be subject to the jurisdiction of the Commission.* Petitioner

[1]Sec. 4 (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date of this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. (Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, et seq.)

is not in default under this section, and the Commission is not by this section given any rate-making power.

Congress could not have intended by Section 4 (c) to require a company to fix and establish rates for all types of service which it conceivably could render. The language of the section proves this. Congress is not so inept in the use of language that, had it intended to make such a requirement it would have phrased the requirement in such meaningless terms. A comparison of Section 4 (c) with Section 16 (a) of Part II of the Interstate Commerce Act,[2] establishes the fact that when Congress intends to place upon a carrier the obligation to make and establish rates for service it does so in clear and unmistakeable terms. It does not do so merely by imposing upon the carrier a requirement that it file with the Commission and keep open for inspection all schedules, and contracts affecting them.

The Commission's present argument can be tested by its past statements in this proceeding. These show that it did not previously contend that under Section 4 (c) petitioner must, prior to request therefor, establish rates for any and all transportation which it conceivably could render to a shipper.

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[2]Sec. 16 (a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable divisions of joint fares. It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in cases of joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. (Interstate Commerce Act, Part II, 49 Stat. 558, 52 Stat. 1240, 54 Stat. 924, 49 U. S. C. 316.)

In its opinion which is a part of its order of March 22, 1946, it thus characterized the issues in this proceeding:

> "As we conceive the substantive issue presented for our determination, the only question is whether rates for the common carrier transportation of natural gas through respondent's Baker-Bowdoin system, established pursuant to the provisions of the Leasing Act of 1920, as amended, and filed with this Commission, are just and reasonable" (R. I, 120).

In its order of March 22, 1946, the Commission prescribed only rates for transportation on a firm delivery basis. In the concluding paragraph of its prescribed rate schedule it states:

> "Under the conditions discussed herein, the company may provide rates for common-carrier transportation service on a firm delivery basis for distances less than thirty-five (35) miles and more than three hundred (300) miles. *Moreover, upon application the company shall,* if it has adequate facilities, provide rates for transportation on an interruptable or off-peak basis" (R. I, 145). (Italics supplied.)

If petitioner under Section 4 (c) of the Natural Gas Act is required to establish and file its rates for all types of transportation service which it conceivably could render, although no request for rates has been made, petitioner will have failed to discharge its obligation even though it accepts the rate prescribed by the Commission. How, under its present argument, can the Commission reconcile its provision that the company's duty to provide rates for off-peak deliveries, is to be *"upon application"?*

The Commission obviously has either gone entirely too far, or it has not gone far enough. If Section 4 (c) has the meaning that the Commission now ascribes to it petitioner will never know when it ceases to be delinquent in the discharge of the obligation placed upon it. There no

doubt will always be some form of service which it could give, which it has not been asked to give, and for which it has established no rates.

The obvious conclusion is that Section 4 (c) imposes only a requirement for filing existing schedules and contracts. The Commission's only rate-making power comes from Section 5 (a)[8] of the Natural Gas Act, which gives it no power to fix rates on a line where no rates previously existed and where no request for rates has ever been made.

We therefore respectfully renew our request for the issuance of a writ of certiorari to the Court of Appeals for the Eighth Circuit.

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[8]Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential ,otherwise unlawful ,or are not the lowest reasonable rates. (Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, et seq.)